93-79

Supreme Court, U.S.
FILED
JUL 14 1993
OFFICE OF THE CLERK

NO. 93 -

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

BETTY EDWARDS,

Petitioner
Versus

ARLINGTON HOSPITAL ASSOCIATION
AND EVELYN VARDIMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Clara A. Williamson
211 N. Union Street
Suite 100
Alexandria, VA 22314
(703) 548-0738
Attorney for Petitioner

QUESTIONS PRESENTED

I. Whether the statements made concerning the petitioner constitute protected opinion under the First Amendment or actionable defamation under the test enunciated by the United States Supreme Court in abolishing the separate opinion doctrine in defamation law.

II. Whether the state court decision was based upon adequate, independent state grounds or whether the state court rested its decision primarily on federal law so as to permit United States Supreme Court review.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING WRIT OF CERTIORARI	20
I. THE STATEMENTS MADE CONCERNING THE PETITIONER DO NOT CONSTITUTE PROTECTED OPINION UNDER THE FIRST AMENDMENT, INASMUCH AS THEY CONTAIN PROVABLY FALSE FACTUAL CONNOTATIONS UNDER THE TEST ENUNCIATED BY THE UNITED STATES SUPREME COURT IN ABOLISHING THE SEPARATE OPINION DOCTRINE IN THE LAW OF DEFAMATION.	20
II. THE DECISION OF THE STATE COURT WAS NOT BASED ON ADEQUATE, INDEPENDENT STATE GROUNDS, BUT PRIMARILY ON FEDERAL LAW SO AS TO PERMIT REVIEW BY THE UNITED STATES SUPREME COURT.	32

PAGE

CONCLUSION 35

APPENDIX

1. Order, Arlington Circuit Court, July 9, 1992
2. Order, Denying Petition For Appeal, February 25, 1993
3. Order Denying Rehearing, April 16, 1993

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Gertz v. Robert Welch, Inc.,
418 U.S. 323, 94 S. Ct. 2997,
412 L. Ed. 2d 789 (1974) 21, 22, 34

Michigan v. Long,
463 U.S. 1032, 103 S. Ct., 3469,
77 L. Ed. 2d 1201 (1983) 34

PAGE

Milkovich v. Lorain Journal Co., et al.
497 U.S. 1, 110 S. Ct. 2695,
111 L. Ed. 2d 1 (1990)
20, 22, 23, 24, 26, 34

OTHER FEDERAL CASES

Blue Ridge Bank v. Veribanc, Inc.,
866 F. 2d 681 (4th Cir. 1989) 33

Chapin v. Greve,
787 F. Supp. 557 (E.D. Va. 1992)
23, 31, 33

Potomac Value and Fitting, Inc. v.
Crawford Fitting Co.,
829 F. 2d 1280 (4th Cir. 1987) 33

STATE COURT DECISIONS

Chaves v. Johnson,
230 Va. 112, 355 S.E. 2d 97 (1985)
31, 34

Immuno AG v. Moor-Jankowski,
567 N.E. 2d 1270, cert. denied,
497 U.S. 1021, 110 S. Ct. 3266,
111 L. Ed. 2d 776 (1990) 29, 30

Rinaldi v. Holt, Rinehart & Winston,
42 N.Y. 2d 369, 366 N.E. 2d 1299
(1977) 32

BETTY EDWARDS petitions for a Writ of Certiorari to the Virginia Supreme Court to review the Order denying the Petition For Appeal which issued on February 25, 1993, and the Order denying the Petition For Rehearing issued on April 16, 1993.

OPINIONS BELOW

The Order of the Virginia Supreme Court denying Petitioner's Petition For Appeal from a Final Judgment Order of the Circuit Court of Arlington County Virginia, was issued on February 25, 1993, App. at 8, and the Order denying the Petition For Rehearing was issued on April 16, 1993, App. at 9. The Order of the Arlington County Virginia Circuit Court was entered July 9, 1992, setting aside a jury verdict in favor of the Petitioner, App. at 1.

JURISDICTION

This court's jurisdiction to review the Virginia Supreme Court Order of April 16, 1993, is invoked pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

FIRST AMENDMENT TO U.S. CONSTITUTION

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The Petitioner filed her Petition For Appeal to the Virginia Supreme Court from an Order of the Circuit Court of Arlington County Virginia setting aside a jury verdict in favor

of Petitioner on the basis that the statements made concerning her were constitutionally protected opinion rather than actionable defamation.

The issue concerning the opinion versus fact character of the statements was raised by the Respondents in a Motion To Strike the Petitioner's evidence made at the conclusion of Petitioner's case. The motion was denied and then renewed at the conclusion of all of the evidence. It was again denied, and the case was submitted to the jury for decision. Following the jury verdict, the Respondents made a motion to set aside the verdict and for judgment notwithstanding the verdict which motion was heard by the court on May 29, 1992. In the arguments made to the court and in supporting memoranda filed with the court, Respondents argued that under the Federal and

State constitutions, the statements at issue constituted protected opinion. The United States Supreme Court decision in Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990), as well as other federal cases, were cited and argued to the court by both parties.

Pertinent portions of the argument made to the court by Counsel for Petitioner in opposition to the Motion To Strike, in which the federal question was raised, are as follows:

> Your Honor, the plaintiff, with regard to the allegations that the statements are statements of opinion, we contend that the statements are not opinion. They are assertions of false, defamatory statements that can be characterized

> as true or false... I would like to also cite to the Court the case of Milkovich v. Lorain Journal Co. decided by the U.S. Supreme Court in June of 1990, holding that there is no need for a separate opinion privilege in the defamation law, that the safeguards in state defamation law are adequate without carving out a separate constitutional privilege. I'm sure the Court is familiar with the Milkovich opinion... In applying the test in Potomac Value v. Crawford, the question is whether the statement is verifiable...

In support of their motion to set aside the verdict and for judgment notwithstanding the verdict counsel for Respondents argued, in

pertinent portions, as follows:

> ...if we look at the cases where the statements were found to be fact, I think we can understand the opinion nature of this statement. If you look at Milkovich, the writer said, In my opinion, anybody could tell that the coach was lying when he testified... there was someplace to go to determine whether that was true or false. It could be objectively verified.

The trial court, in considering Respondents' motion to set aside the verdict and for judgment notwithstanding the verdict, ruled, as a matter of law, that the statements made concerning Petitioner were defamatory <u>per se,</u> but that they were loosely definable and variously interpretable; that they could not

be characterized as true or false; that they did not contain defamatory assertions of objective fact; that they were incapable of being proved true or false by objective means; and that they were nonactionable based on the legal authority cited in Respondent's memorandum of points and authorities supporting their motion to set aside the jury's verdict and for judgment notwithstanding the verdict. App. at 6.

When the court submitted the case to the jury for deliberation, the jurors were requested to answer three questions: 1) Were the statements made concerning the Petitioner false? 2) Were the statements made with common-law or actual malice? 3) If so, what should the damages be? The jury returned with a unanimous verdict in favor of the Petitioner. As to the question of whether the

statements were false, the response was affirmative. As to whether the statements were made with malice, the response was again affirmative. As the question of damages, the jury awarded the Petitioner $90,000.00 in compensatory damages.

The trial court set aside the verdict and granted the motion for judgment notwithstanding the verdict on the sole basis that the statements at issue were nonactionable statements of opinion. The jury found the statements to be false, and the court did not rule that the evidence submitted by Petitioner to prove the falsity of the statements was insufficient to support the verdict. Rather, the court ruled that due to the character of the statements, they could not, as a matter of law, be proved true or false. Therefore, the issue now presented is

whether the statements contain provably false factual connotations, not whether they are, in fact, false.

On March 27, 1990, a notice appeared in the Communications Book, maintained in the staff lounge on the psychiatric unit of Respondent Arlington Hospital. The notice concerned the Petitioner, a registered psychiatric nurse, and was prepared and signed by Evelyn Vardiman, Head Nurse of the Psychiatric Unit at that time. The notice stated that the Petitioner had been removed from the PRN (on call) Register "due to issues in regard to reliability" and implied that she had been counseled or reprimanded on three prior occasions concerning this issue by three specifically named individuals. The full text of the notice is as follows:

Betty Smith Edwards has currently

been dropped from the PRN pool due to issues in regard to reliability. Staff are not authorized to discuss this officially with Betty outside the hospital or in the hospital -- refer her to Mike Malone in personnel. Phil Gaffney has spoken to her, Kim spoke to her in the past and I have talked to her. There is no reason for anyone to speak to her on this issue. Thank you -- we will be discussing this further as a Staff in staff meet. re: parameters of PRN pool.

Evelyn

The Communications Book was regularly maintained in the staff lounge of the Psychiatric Unit and functioned primarily as a bulletin board to communicate information of

various types to the staff at large. The staff comprised not only psychiatric nurses, but many other categories of employees as well. Other categories of employees on staff included; student nurses, psychiatric technicians, various types of therapists, social workers, student social workers, secretaries, maid and janitorial employees. All employees on staff had access to the staff lounge where the Communications Book was maintained, including visiting physicians and personnel from other hospitals.

No notice of this type had ever appeared in the Communications book previously, as publication in the Communications Book was not the normal method of conveying information concerning an employee's status. Other nurses were removed from the register at the same time Petitioner was removed, and no notice

concerning any of them appeared in the Communications Book.

The Petitioner had been employed by the Respondent Arlington Hospital Association as a registered psychiatric nurse on the Psychiatric Unit on the PRN or "on call" register for ten (10) years when she was removed in March, 1990. PRN nurses did not have any particular number of hours of shifts they were required to work, as they were not full time employees. Their hours were negotiated between them and the Hospital. A PRN nurse might remove herself from the register for an entire summer. If a PRN nurse was unable to work a previously scheduled shift, it was an acceptable practice for the PRN nurse to send in an appropriate replacement from the PRN pool, although this was not a requirement.

It is uncontroverted that "reliability" encompasses the whole question of professional competence. Further, the notice concerning Petitioner's "reliability" did not confine itself to any particular time period. The evidence submitted by Petitioner and considered by the jury to prove the falsity of the statements in the notice consisted of testimony of supervisors and co-workers concerning her job performance, performance evaluations from 1980 through 1989, and a comparison summary of hours actually worked by all PRN nurses for 1988 and 1989.

The testimony concerning Petitioner's job performance as a psychiatric nurse is summarized as follows: She was a highly competent nurse who administered excellent patient care; she was very compassionate and caring and had good rapport with her patients;

she was good in helping patients who were withdrawn to communicate with others; she had a calming effect on very aggressive, assaultive type of patients; she frequently came in on short notice, in bad weather and was never late reporting for a shift; she was someone they could count on to come in snow storms and after being called at the last minute; she postponed vacation plans if she was needed on the unit; she was accurate in medication administration; she was cool and calm in a crises; she worked so frequently that she was considered part of the permanent staff.

The evidence was also uncontroverted that in terms of actual hours worked by PRN nurses for 1988, Petitioner ranked third out of twenty-six PRN nurses on the register. In 1989, Petitioner ranked fourth out of twenty-

six PRN nurses on the register.

Petitioner received yearly performance appraisals from 1980 though 1989. Her 1980 performance appraisal stated:

> She is very reliable and available - works well with staff and patients.

Her 1986 performance appraisal, in relevant portions, stated:

> She is able to effectively establish a therapeutic relationship with her assigned patients. She has a caring and empathetic manner which helps patients trust and feel safe with her... Betty is consistently on time for all scheduled shifts. If she has a change of plans after she has committed to work on PTU, she will find an appropriate replacement... She has remained available and

flexible with the various staffing needs during her work in the pool. She has worked on short notice when the unit was extremely busy.

Plaintiff's 1988 Performance Appraisal, in relevant portions, stated:

She develops a therapeutic relationship with her patients and consistently utilizes good judgment in the delivery of her patient care... She is able to prioritize well in crisis situations, and maintains a calm, positive demeanor during very stressful periods on the unit... Betty arrives on time to all scheduled shifts and advises AHN of availability for additional shifts ahead of time... Betty was extremely supportive of PTU during a major

staffing turnover this past year covering holes on other than her preferred shift. she also postponed vacation plans to lend her support while several new staff members transitioned on to the unit.

Her 1989 performance appraisal, in relevant portions, stated:

> She works frequently and has come in on short notice... She has arrived on time and has accommodated the unit by covering some day and night shifts when staffing was very short. This evidenced real commitment on her part... Despite the PRN status, she is perceived as an extension of the permanent staff... Despite a brief period of personal crisis - Betty has never allowed her personal

life to effect her relationship with patients or colleagues in a negative way. Her reliability has generally been outstanding. When she has had to make a change after she has committed to a shift, she finds an appropriate replacement and alerts ANH. (emphasis added)

Petitioner was required, by reason of personal problems, to remove herself from scheduled shifts for periods of time in January, February and March, 1990. She was granted full permission by the then Head Nurse to be absent from these shifts. She was advised to let them know when she was ready to return to work. She was not advised that her position was in jeopardy in any way or that her reliability had been called into question. Petitioner never failed to show up for work

without permission, notice, and when possible, sending in an appropriate replacement, although this was not required due to the nature of a PRN's position.

When Petitioner returned to work in March, 1990, she was informed by the Head Nurse at that time, Respondent Evelyn Vardiman, that she had been removed from the PRN register. Several days later Petitioner contacted Respondent Evelyn Vardiman and requested written reasons for her removal. No written reasons were ever provided to Petitioner as per her request. Rather, on March 27, 1990, a notice appeared in the Communications Book, accessible to anyone who used the staff lounge, that Petitioner had been removed from the PRN register "due to issues in regard to reliability" and further implying that Phil Gaffney, Kim Donahue and

Evelyn Vardiman had all previously counseled or reprimanded her concerning that issue.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE STATEMENTS MADE CONCERNING THE PETITIONER DO NOT CONSTITUTE PROTECTED OPINION UNDER THE FIRST AMENDMENT, INASMUCH AS THEY CONTAIN PROVABLY FALSE FACTUAL CONNOTATIONS UNDER THE TEST ENUNCIATED BY THE UNITED STATES SUPREME COURT IN ABOLISHING THE SEPARATE OPINION DOCTRINE IN THE LAW OF DEFAMATION.

The Supreme Court's decision in Milkovich v. Lorain Journal Col, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990) changed the contours of actionable speech under the Federal Constitution. Recognizing the existing safeguards in state defamation laws, the Supreme Court held that the First Amendment does not require a separate opinion privilege limiting the application of state defamation

laws. The Court recognized that statements on matters of public concern must be provable as false before they are actionable. Matters of public concern which do not contain a "provably false factual connotation" receive full constitutional protection. The Court also recognized protection for statements that cannot reasonably be interpreted as stating actual facts about an individual.

In pre-Milkovich decisions, the Federal and State courts held that statements of opinion were protected from defamation actions by the First Amendment. These holdings were primarily based upon the following dictum in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974):

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may

> seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Gertz at 339 - 340.

The Supreme Court in Milkovich held, however, that this passage from Gertz was not intended to create a wholesale defamation exception for anything that might be labeled as opinion. The "breathing space" which freedoms of expression require in order to survive is adequately secured by existing constitutional doctrine without creating an artificial dichotomy between opinion and fact. Milkovich at 2706. Any other interpretation, said the court, would be contrary to the tenor and context of the Gertz passage and would

also ignore the fact that expressions of opinion may often imply an assertion of objective fact.

The United States District Court for the Eastern District of Virginia recently recognized in Chapin v. Greve, 787 F. Supp. 557 (E.D. Va. 1992), that even if a challenged statement cannot be characterized as true or false and is, thus, constitutionally protected opinion, a further inquiry is mandated under Milkovich, namely, whether the statement contains provably true or false factual connotations that render it actionable.

In Respondent's memorandum of points and authorities, cited in the trial court's Order, they ostensibly relied upon both State and Federal law to support the proposition that pure expressions of opinion cannot form the basis of an action for defamation. However, a

closer examination of the decision in Chaves v. Johnson, 230 Va. 112, 355 S.E. 2d 97 (1985), upon which Respondents primarily relied to support their state constitutional argument, reveals that the Court relied principally upon the aforesaid passage from Gertz. This was the exact passage found by the Supreme Court in Milkovich to be inappropriately relied upon in determining the character of statements as opinion versus fact. Therefore, the state constitutional basis for the decision is flawed by the later pronouncements of the Supreme Court in Milkovich. Although the Court in Chaves made a passing reference to Article I, Section 12 of the Virginia constitution in connection with the First Amendment to the Federal Constitution, the Court proceeded to quote the Gertz passage as a basis for the decision.

Moreover, Article I, Section 12 of the Virginia Constitution does not afford a person unbridled discretion to speak without responsibility, but rather recognizes the balance to be struck between the right of free expression and the right of defamed individuals to hold the speakers responsible for damage to reputation. Article I, Section 12 provides:

> That the freedom of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write and publish his sentiments on all subjects, <u>being responsible for the abuse of that right ...</u> (emphasis added)

It is beyond cavil that the statements

made concerning Petitioner are capable of being characterized as true or false, as shown by the objective core of evidence submitted by Petitioner to prove their falsity. However, certainly when viewed in light of the further inquiry mandated by Milkovich, these statements contain provably false factual connotations that render them actionable. The statement published in the Communications Book, where no notice of it's kind had ever appeared before, stated that the Petitioner had been dropped from the PRN pool due to issues in regard to her reliability.

As discussed, supra, the notice went on to imply that she had been counseled or reprimanded about unreliability on three prior occasions by three specifically named individuals. There are a myriad of adverse facts which a reasonable reader could imply

about Petitioner after reading this notice, e.g., that she had mixed up patient's medications or failed to follow doctor's orders. It was uncontroverted that Petitioner was a competent psychiatric nurse and, indeed, her performance evaluations from 1980 until the last one performed in 1989 substantiate that fact. Her reliability was rated as "outstanding."

In citing the reasons for Petitioner's rating of "outstanding" in her performance evaluations, Respondent defined the components of reliability on which it relied in so doing. Those components defined by Respondent include the following:

> She develops therapeutic relationships with patients...
>
> Exercises good judgment in patient care...

Maintains calm, positive demeanor during stressful periods...

Arrives on time to all scheduled shifts...

Worked frequently and on short notice...

Never allowed personal life to effect her relationship with patients or colleagues in a negative way...

When she has to make a change <u>after</u> committing to a shift, she finds an appropriate replacement and alerts Assistant Head Nurse...

Therefore, Respondents' argument that the particular components considered in assessing one's reliability are completely subjective is without merit, as the Respondent Hospital itself defined those components in this particular hospital community.

The statements concerning these prior

conversations concerning her reliability are clearly capable of being objectively characterized as true or false. They either occurred in the manner portrayed or they did not.

Even applying the rationale enunciated by the Court of Appeals of New York in Immuno AG V. Moor-Jankowski, 567 N. E. 2d 1270 (1991), cert. denied, 497 U.S. 1021, 110 S. Ct.3266, 111 L. Ed. 2d 776 (1990), there is nothing in the words themselves or the overall context of the notice to suggest that the statements were statements of opinion. In Immuno, the court stated that in determining whether speech is actionable, courts must additionally consider the impression created by the words used as well as the general tenor of the expression from the point of view of the reasonable

reader. Immuno at 1273.[1] Unlike the statements in Immuno, the statements concerning Petitioner did not appear in a letter to the editor or in any other place

---

[1] In Immuno, the United States Supreme Court granted certiorari, vacated the judgment of the New York Court of Appeals and remanded the case for further consideration in light of the decision in Milkovich. The New York Court of Appeals had originally held that the statements were constitutionally protected opinion under the State and Federal guarantees of free speech. When considering the case on remand, the New York Court of Appeals again held that the statements were protected opinion but asserted an independent state ground as a basis for the decision so as to foreclose further review by this court. Certiorari was then denied.

where one would expect statements of opinion to be located. This was a statement concerning an adverse personnel action which appeared in a place where no notice of this kind had ever appeared before.

The character of the statements concerning Petitioner was also vastly different than the character of the statements made in other cases relied upon by the trial court. In Chaves v. Johnson, the court held that a charge of inexperience was not defamatory. In Chapin v. Greve, 787 F. Supp. 557 (E.D. Va. 1992), the Court held that the statements were not defamatory and further that the plaintiff had thrust himself into the public arena where open criticisms could be expected. In stark contrast, Petitioner was a private citizen who had in no way thrust herself into the public arena. Even in

Rinaldi v. Holt, Rinehart & Winston, 42 N.Y. 2d 369, 366 N.E. 2d 1299(1977), where the plaintiff was a public official, the court stated that the allegations that the judge was "probably corrupt" were actionable. However, unlike the Petitioner herein, in that case the plaintiff failed to introduce evidence to create a triable issue of fact concerning those particular allegations.

The statements made concerning Petitioner clearly contain probably false factual connotations and should be examined in light of Milkovich. The state court has decided a federal question that conflicts with applicable decisions of this court.

II. THE DECISION OF THE STATE COURT WAS NOT BASED ON ADEQUATE, INDEPENDENT STATE GROUNDS, BUT PRIMARILY ON FEDERAL LAW SO AS TO PERMIT REVIEW BY THE UNITED STATES SUPREME COURT.

The state court's Order holding that the

statements at issue were nonactionable expressions of opinion was not based on adequate and independent state grounds and, therefore, the United States Supreme Court has jurisdiction to review the case in light of Milkovich. Moreover, in denying the Petitioner's appeal, the Virginia Supreme Court has not decided the case on adequate and independent state grounds. There is, therefore, no impediment to Supreme Court review of this case.

In holding that the statements at issue constituted protected opinion the trial court relied upon the following Federal cases: Milkovich v. Lorain Journal Co., supra, Potomac Value and Fitting, Inc. v. Crawford Fitting Company, 829 F. 2d. 1280 (4th Cir. (1987); Blue Ridge Bank v. Veribanc, 866 F. 2d 681 (4th Cir. 1989) and Chapin v. Greve,

supra. The state court decision relied upon to support this proposition was Chaves v. Johnson, supra. The court in Chaves, however, relied upon the exact passage from Gertz, later determined by the court in Milkovich to be inappropriately relied upon in determining opinion versus fact. Therefore, the state law relied upon by the trial court can not be considered an adequate and independent state ground so as to preclude review by this court.

The references to the State Constitution in Chaves in no way indicated that the decision in that case rested on grounds in any way independent from the state court's interpretation of federal law. See, Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). Similarly, in this case, the trial court did not explicate whether the decision was based on federal or state law.

Rather, it fairly appears that the court rested its decision on federal law. The cases cited and argued to the court involve the interpretation and application of federal law.

CONCLUSION

In summary, this Petition should be granted because important constitutional questions are presented concerning the opinion doctrine in defamation law after Milkovich and merit a full exposition by the Court. The decision of the state court is in conflict with federal law as decided by this court.

Respectfully submitted,

Clara A. Williamson, Esq.
211 N. Union Street
Suite 100
Alexandria, VA 22314
(703) 548-0738
Attorney for Petitioner

APPENDIX

V I R G I N I A :

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

BETTY EDWARDS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	At Law No. 90-1254
	:	
ARLINGTON HOSPITAL ASSOCIATION, et al.,	:	
	:	
Defendants.	:	

FINAL JUDGMENT ORDER

THIS CAUSE came on to be heard before a jury and the undersigned on April 8, 9, 13, and 14, 1992, and before the undersigned on Motions Day on May 29, 1992, upon the pleading heretofore filed. The entire proceedings were recorded by a court reporter duly sworn. As the proceedings began, potential jurors were duly called and examined upon voir dire. One juror was struck for cause and each side

struck three jurors leaving seven jurors who were then sworn to well and truly try the issues joined.

Following the impaneling of the jury, the plaintiff presented her proof which included the testimony of witnesses and the introduction of exhibits. After plaintiff rested, defendants moved to strike the evidence of the plaintiff and for entry of Summary Judgment. Those motions were denied without prejudice, and the defendants' objections were duly noted.

Thereafter, the defendants presented their proof, including the testimony of their witnesses and the introduction of exhibits. Defendants then rested their case, and the plaintiff presented rebuttal evidence. At the close of all the evidence, the defendants renewed their Motions to Strike the

plaintiff's evidence and for Summary Judgment. The Court denied defendants' motions. The parties' objections to the rulings adverse to each were duly noted.

While preserving all arguments and bases for their Motions to Strike and all objections to the Court's rulings thereon, counsel then submitted and argued their respective jury instruction requests, the Court granting some and refusing others as to each party as the record reflects (specifically including a rejection of plaintiff's request for a punitive damages instruction), to which action the parties noted their respective objection to adverse rulings. The Court thereupon instructed the jury, and counsel for each party in the case delivered final arguments. The jury then retired to deliberate its verdict, and in due course on April 14, 1992,

returned with a unanimous verdict in favor of the plaintiff and awarded plaintiff Ninety Thousand Dollars ($90,000.00) in compensatory damages. At defendants' request, the jury was polled, and in response, each of the seven jurors confirmed the unanimous verdict as his or her separate verdict.

Following the return of the jury's verdict, the defendants request for time in which to file post-verdict motions was granted by the Court. The Court also designated a time within which plaintiff could file an opposition to the defendants' post-verdict motions.

Within the time designated, defendants filed a motion to set aside the jury verdict and enter judgment notwithstanding the verdict on behalf of each defendant, and, in the alternative, for a new trial or remittitur,

and a supporting memorandum of points and authorities. Within the designated time, plaintiff filed a Memorandum of Points and Authorities opposing the defendants' motions.

After being duly noticed, defendants post-verdict motions were heard on May 29, 1992, before the undersigned.

The Court having fully considered the pleadings, the evidence adduced at trial, the Memoranda of Points and Authorities submitted by the parties, and the arguments of counsel, the Court finds and concludes as a matter of law that:

1. the statements are defamatory <u>per se;</u> however;

2. the statements are loosely definable and variously interpretable;

3. the statements cannot be objectively characterized as true or false;

4. therefore, they are opinion statements rather than fact statements;

5. the statements of opinion do not contain defamatory assertions of objective fact;

6. due to the nature of the statements, plaintiff cannot prove their falsity nor can defendants prove their truth by objective means;

7. the statements are nonactionable based on the legal authority cited in defendants' memorandum of points and authorities supporting their motion to set aside the jury's verdict and for judgment notwithstanding the verdict.

The Court further finds and concludes as a matter of law, for the reasons set forth above, that the defendants' motion to set aside the jury verdict and to enter judgment

notwithstanding that verdict in favor of the defendants should be granted; it is, therefore,

ADJUDGED AND ORDERED that the jury verdict in favor of the plaintiff is hereby set aside, and that judgment notwithstanding the jury verdict is entered in favor of the defendants, The Arlington Hospital Association and Evelyn Vardiman. The objection and exception of the plaintiff is duly noted.

ENTERED AS A FINAL ORDER this 9th day of July, 1992.

Benjamin Kendrick, Judge

# # # # # # #

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 25th day of February, 1993.

Betty Edwards,

Appellant,

against Record No. 921554
Circuit Court No. L-90-1254

Arlington Hospital Association, et al.,
Appellees.

From the Circuit Court of Arlington County

Upon review of the record in this case and consideration of the arguments submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the

petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

# # # # # # #

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 16th day of April, 1993.

Betty Edwards,

Appellant,

against Record No. 921554
Circuit Court No. L-90-1254

Arlington Hospital Association, et al.,

Appellees

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 25th day of February, 1993 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

David B. Beach

Clerk

(2)

Supreme Court U.S.
FILED
AUG 13 1993
OFFICE OF THE CLERK

No. 93-79

IN THE

Supreme Court of the United States

October Term, 1993

BETTY EDWARDS,

Petitioner,

V.

ARLINGTON HOSPITAL ASSOCIATION
AND EVELYN VARDIMAN,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

RESPONDENTS' BRIEF IN OPPOSITION

Judith B. Henry
Counsel of Record
Thomas G. Smith
CREWS & HANCOCK
700 E. Main Street, Suite 1015
Post Office Box 1474
Richmond, Virginia 23212-1474
(804) 649-9333

Counsel for Respondents

Appellate Printing Services • 523 East Main Street • Richmond, VA 23219 • (800) 642-7789

BEST AVAILABLE COPY

27pp

QUESTIONS PRESENTED

1. Whether the allegedly defamatory statements made concerning the petitioner are nonactionable because they do not imply any assertion of objective fact and are not susceptible of being proved true or false.

2. Whether the state court decision was based upon an adequate and independent state ground, article I, § 12 of the Constitution of Virginia, precluding review by this Court.

RULE 29.1 LIST

The parent company of Arlington Hospital Association is The Arlington Hospital Foundation, Inc. The only subsidiary in which Arlington Hospital Association has a partial ownership interest is Home Health Services of Northern Virginia.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.1 LIST ii

TABLE OF AUTHORITIES iv

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION 7

I. The State Court Properly Held These Statements of Opinion To Be Nonactionable Because They Did Not Imply Any Assertion of Objective Fact Which Could Be Proved True or False. 7

II. The Decision Below Rests Upon An Adequate and Independent State Ground Which Precludes Review By This Court 14

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: **Page**

Chapin v. Knight-Ridder, Inc., 993 F.2d 1087 (4th Cir. 1993) 12

Chaves v. Johnson, 230 Va. 112, 335 S.E.2d 97 (1985) 15-19

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 17

Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 334 S.E.2d 846 (1985) 20

Kroger Co. v. Young, 210 Va. 564, 172 S.E.2d 720 (1970) 20

Lapkoff v. Wilks, 969 F.2d 78 (4th Cir. 1992) 17

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) . . . . . *passim*

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 8

Richmond Newspapers, Inc. v. Lipscomb, 234 Va. 277, 362 S.E.2d 32 (1987), *cert. denied*, 486 U.S. 1023 (1988) 19

The Gazette v. Harris, 229 Va. 1, 325 S.E.2d 713, *cert. denied*, 472 U.S. 1032 (1985) 15

Page

Miscellaneous:

James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761 (1992) 19

A. E. Dick Howard, *Commentaries on the Constitution of Virginia* (1974) 18

David C. Kohler, *Toward a Modern Defamation Law in Virginia: Questions Answered, Questions Raised*, 21 Univ. of Rich. L. Rev. 3 (1986) 17

Bruce W. Sanford, *Libel and Privacy* §5.3.2 (2d ed. 1991) 9

Rodney A. Smolla, *Law of Defamation* (1993) 10

No. 93-79

IN THE

Supreme Court of the United States

October Term, 1993

BETTY EDWARDS,

Petitioner,

v.

ARLINGTON HOSPITAL ASSOCIATION AND EVELYN VARDIMAN,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

The respondents, Arlington Hospital Association and Evelyn Vardiman, respectfully request that this Court deny the petition for writ of certiorari to the Supreme Court of Virginia, seeking review of that court's order dated February 25, 1993 denying the petition for appeal and

its order dated April 16, 1993 denying the petition for rehearing. Neither the orders of the Supreme Court of Virginia, nor the opinion of the Circuit Court for the County of Arlington are reported.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the First Amendment to the United States Constitution referenced in the Petition for Certiorari, this case also involves application of article I, § 12 of the Constitution of Virginia, which reads as follows:

> That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

STATEMENT OF THE CASE

Petitioner Betty Edwards was employed as a psychiatric nurse at Arlington Hospital working in an "as needed, on call" capacity. Nurses who work on this basis are included in a "PRN pool." Ms. Edwards was removed from the pool in March 1990. This defamation action arose out of the circumstances surrounding her removal from the pool.

Since Ms. Edwards was an employee at will, she did not contest her termination, but instead complained that the head nurse for the Hospital's psychiatric unit, Evelyn Vardiman, defamed her by writing an entry in the "communications book," a notebook kept on the unit to be read by staff members. The entry was placed in the book because of inquiries from the nursing staff

concerning Ms. Edwards' status and read as follows:

> Betty Smith Edwards has currently been dropped from the PRN pool due to issues in regard to reliability. Staff are not authorized to discuss this officially with Betty outside the hospital or in the hospital -- refer her to Mike Malone in personnel. Phil Gaffney has spoken to her, Kim spoke to her in the past and I have talked to her. There is no reason for anyone to speak to her on this issue. Thank you -- we will be discussing this further as a staff in staff meet. re: parameters of PRN pool.
>
> Evelyn

The following evidence adduced at trial relates to issues in regard to reliability which were considered in removing Ms. Edwards from the PRN pool for the Hospital's psychiatric unit. In 1987 Ms. Edwards attempted suicide and was absent from the unit for a month. In September 1988, she attempted suicide and was absent from the unit for an extended

period of time. Ms. Edwards cancelled a number of scheduled shifts in December, 1989, and January, 1990. She found replacement personnel for the most part in December, but in January, she did not replace herself on the schedule. She attempted suicide in January of 1990 and upon her release from the hospital, she went to Florida for an extended period rather than undergo psychiatric treatment. She did not tell her supervisor of problems leading up to her suicide attempt as she had been requested to do. She was unavailable for work on the psychiatric unit for approximately three months in 1990 prior to her termination.

Ms. Edwards claimed at trial that she was removed from the PRN pool as a result of unavailability or because of her suicide attempts, rather than due to issues in

regard to reliability. Mrs. Vardiman considered the issues relating to Ms. Edwards' unavailability and suicide attempts to be issues in regard to reliability. Ms. Edwards' supervising nurses were consulted concerning these issues and all agreed that she should be removed from the pool.

According to the evidence, three registered nurses saw the entry regarding Ms. Edwards in the Communications Book. Each testified, however, that she did not change her opinion of Ms. Edwards based on the information contained therein.

REASONS FOR DENYING THE PETITION

I. The State Court Properly Held These Statements Of Opinion To Be Nonactionable Because They Did Not Imply Any Assertion Of Objective Fact Which Could Be Proved True Or False.

Petitioner's assertion that the state court decision in this case conflicts with the Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), is incorrect. In *Milkovich*, the Court held that there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" 497 U.S. at 18. Such an interpretation would ignore the fact that statements of opinion "may often imply an assertion of objective fact." *Id.* Existing constitutional doctrine sufficiently protects freedom of speech without creating "an artificial dichotomy between 'opinion' and fact." *Id.* at 19. For example, the Court's decision in

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) ensures that a statement of opinion which does not contain a provably false factual connotation will be constitutionally protected. *Id.* at 20.

In *Milkovich*, the Court found that the statements in question implied an assertion that the petitioner, a high school wrestling coach, had perjured himself in a judicial proceeding. The connotation of perjury was "sufficiently factual to be susceptible of being proved true or false." *Id.* at 21. It could be objectively determined whether the coach had lied by comparing his testimony before the athletic board with his later testimony before the trial court. Unlike a subjective assertion, the alleged defamatory statements were "objectively verifiable." *Id.* at 22.

Thus, while the Court rejected a wholesale "opinion" defense to defamation for every statement that might be so categorized, it did not preclude an "opinion" defense where the statement does not imply an assertion of objective fact or where it lacks any connotation sufficiently factual to be susceptible of being proved true or false. Essentially, the Court rejected an artificial pigeonholing of statements as opinion or fact and required a more probing analysis for determining when opinion is nonactionable. "Rather than emphasizing the *a priori* classifications of fact and opinion, the *Milkovich* test places a premium on the objectivity and verifiability of a statement." Bruce W.Sanford, *Libel and Privacy* § 5.3.2 (2d ed. 1991); *accord*

Rodney A. Smolla, *Law of Defamation* § 6.01[2] (1993).

In the instant case, the trial court did not simply label or classify the statements in issue as "opinion" and therefore find them to be constitutionally protected. Rather the court, upon careful scrutiny, found that the statements "are loosely definable and variously interpretable;" "cannot be objectively characterized as true or false;" "do not contain defamatory assertions of objective fact;" and "due to the nature of the statements, plaintiff cannot prove their falsity nor can defendants prove their truth by objective means." App. at 5-6. The statements were, therefore, held to be nonactionable. App. at 6. The Supreme Court of Virginia in reviewing the petition for appeal and record in the instant case

held "there is no reversible error in the judgment complained of." App. at 8.

The fact that the *Milkovich* court found that an implied assertion that the petitioner coach had perjured himself was objectively verifiable and susceptible of being proved true or false, while the court below found that respondents' belief that the unavailability and suicide attempts of the petitioner nurse constituted issues in regard to reliability was a subjective assessment not objectively verifiable or susceptible of being proved true or false, does not mean that the holdings conflict. The two cases turn on their respective facts. The court below utilized the principles articulated in *Milkovich* in reaching its decision. As the United States Court of Appeals for the Fourth Circuit has recently stated in construing

Milkovich, "[t]hough opinion *per se* is not immune from a suit for libel, a statement is not actionable unless it asserts a provably false fact or factual connotation." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993).

Respondents take issue with the statements in the petition for certiorari that "[i]t is uncontroverted that 'reliability' encompasses the whole question of professional competence," Pet. at 13, and "[i]t is beyond cavil that the statements made concerning Petitioner are capable of being characterized as true or false," Pet. at 25-26. Every reference to "reliability" does not encompass the whole question of professional competence. The statement in the "communications book" that Betty Edwards was dropped from the PRN pool due to *issues* in regard to reliability

implies that only some elements or aspects of reliability were in question, not every element of professional competence. Whether unavailability, suicide attempts, and failure to apprise her superiors of increasing personal problems as requested relate to "issues in regard to reliability" is a subjective assessment, which is not capable of being characterized as true or false.

Contrary to the assertion in the petition for certiorari, the decision below is not in conflict with *Milkovich* or any other opinion of this Court. In addition, because the state court's holding turns solely upon an analysis of the particular facts involved, it does not warrant review by the Court.

II. The Decision Below Rests Upon An Adequate And Independent State Ground Which Precludes Review By This Court.

The petitioner asserts that the trial court's decision and the state supreme court's order denying the petition for appeal rested exclusively on an interpretation of federal constitutional law. This assertion is incorrect.

In determining that the statements complained of were nonactionable opinion because they did not contain defamatory assertions or connotations of objective fact which could be proved true or false, the trial court expressly relied upon the legal authority cited in defendants' memorandum of points and authorities in support of their motion to set aside the jury's verdict and for judgment notwithstanding the verdict. App. 6. The defendants argued to both the trial court

and the supreme court that the statements were not actionable under art. I, § 12 of the Virginia Constitution. See Memorandum in Support of Defendants Arlington Hospital Association's and Evelyn Vardiman's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for Remittitur or a New Trial (hereinafter "Defendants' Memorandum") at 3; Brief in Opposition to Petition for Appeal at 3.[1]

In their memorandum to the trial court, the defendants identified *Chaves v. Johnson* as "t]he leading case on which defendants rely." Defendants' Memorandum at 6. In *Chaves v. Johnson,* 230 Va. 112,

---

[1] The defendants also cited *The Gazette v. Harris,* 229 Va. 1, 8, 325 S.E.2d 713, 720, *cert. denied*, 472 U.S. 1032 (1985), for the proposition that, apart from any constitutional considerations, under Virginia law a plaintiff must prove falsity as an element of the tort of defamation. Defendants' Memorandum at 3.

335 S.E.2d 97 (1985), the Supreme Court of Virginia held that a pure expression of opinion could not form the basis of an action for defamation because "article 1, section 12 of the Constitution of Virginia protect[s] the right of the people to teach, preach, write or speak any such opinion, however ill-founded, without inhibition by actions for libel and slander." 230 Va. at 119, 335 S.E.2d at 101-02.

As a commentator analyzing defamation cases in the Supreme Court of Virginia has observed with respect to *Chaves*: "the court chose to predicate its decision not only on the first amendment to the United States Constitution, but also on article I, section 12 of the Constitution of Virginia....[Because] federal constitutional law was in a state of flux,

... the court employed the Virginia Constitution to eliminate the uncertainty existing at the federal level." David C. Kohler, *Toward a Modern Defamation Law in Virginia: Questions Answered, Questions Raised*, 21 Univ. of Rich. L. Rev. 3, 19n.105 (1986). *See Lapkoff v. Wilks*, 969 F.2d 78, 81-82 (4th Cir. 1992) (eschewing federal constitutional issue and deciding whether statements of opinion were actionable purely on state law grounds, citing *Chaves. v. Johnson*, 230 Va. 112, 335 S.E.2d 97 (1985) and Va. Const. art. 1, § 12.)

While the petitioner correctly states that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), was cited by the supreme court in *Chaves*, her assertions that the court's decision was solely in reliance on *Gertz* and that this Court's subsequent decision

in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), renders the *Chaves* holding suspect are incorrect. The *Gertz* dictum no doubt influenced the Virginia Supreme Court's holding that the First Amendment to the Federal Constitution protects opinion, but it did not form the basis for the Court's separate holding that the Virginia Constitution protects pure expressions of opinion, not amounting to "fighting words." 230 Va. at 119, 335 S.E.2d at 102. The court quoted from Thomas Jefferson's Inaugural Address in ascertaining those ideals and principles incorporated in the state's constitutional protection of free speech. *Id.* The precepts of Thomas Jefferson were instrumental in the shaping of the Virginia Constitution and state reform in the area of freedom of speech. A.E. Dick Howard, *Commentaries on the*

Constitution of Virginia 251-53 (1974); *see also* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 793 & n.137 (1992)(referencing *Chaves v. Johnson* as the single instance in which the Virginia Supreme Court has cited Thomas Jefferson in construing the state constitution).

Furthermore, a review of the court's analysis in *Chaves* and in *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 297-98, 362 S.E.2d 32, 43 (1987), *cert. denied*, 486 U.S. 1023 (1988), another case involving the "opinion" issue which pre-dated *Milkovich*, demonstrates that in both cases the supreme court properly scrutinized statements labelled "opinion" to determine whether the opinion contained any factual assertion or connotation which was provably true or false.

Because the decision below rests on an adequate and independent state ground, that is, that the statements complained of are not actionable under art. 1, § 12 of the Virginia Constitution, review by this Court is barred.[2]

---

[2] Had the Supreme Court of Virginia granted the petition for appeal in this case, another adequate and independent state ground existed for affirming the judgment. As argued in Defendants' Memorandum and in their Brief in Opposition to the Petition for Appeal (assignment of cross-error no. 1), the court erred in allowing the jury to consider whether there had been an abuse of the qualified privilege which attached. Under Virginia law, "communications by an employer to his employees of the reason for discharge of a fellow employee ... are qualifiedly privileged." *Kroger Co. v. Young*, 210 Va. 564, 567, 172 S.E.2d 720, 722 (1970). Further, no jury instruction may be given which is unsupported by the evidence. *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 155, 334 S.E.2d 846, 854 (1985). There was no evidence to support the instruction given that a privilege is abused when the plaintiff proves by clear and convincing evidence that the defendants knew the statement was false or made it with reckless disregard of whether it was false; the statement was deliberately made

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

By /s/ Judith B. Henry
Counsel

Judith B. Henry
Counsel of Record
Thomas G. Smith
Crews & Hancock
700 East Main Street, Suite 1015
P. O. Box 1474
Richmond, Virginia 23212-1474
(804) 649-9333

Counsel for Respondents

August 13, 1993

---

in such a way that it was heard by persons having no interest or duty in the subject; the statement was unnecessarily insulting; or the language used was stronger or more violent than necessary. See Brief in Opposition to Petition for Appeal at 10-13.

Supreme Court, U.S.
FILED
AUG 27 1993
OFFICE OF THE CLERK

NO. 93 - 79

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

BETTY EDWARDS,

Petitioner
Versus

ARLINGTON HOSPITAL ASSOCIATION
AND EVELYN VARDIMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY TO BRIEF ON OPPOSITION

Clara A. Williamson
211 N. Union Street
Suite 100
Alexandria, VA 22314
(703) 548-0738
Attorney for Petitioner

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether the statements made concerning the Petitioner constitute protected opinion or actionable defamation.

II. Whether the state court decision was based upon adequate, independent state grounds or upon federal law.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
ARGUMENT	
I. THE STATEMENTS MADE CONCERNING PETITIONER CONTAINED PROVABLY FALSE FACTUAL CONNOTATIONS AND, THEREFORE, CONSTITUTE ACTIONABLE DEFAMATION, NOT PROTECTED OPINION.	9
II. THE STATE COURT DID NOT BASE ITS DECISION ON ADEQUATE, INDEPENDENT STATE GROUNDS.	12
CONCLUSION	20

APPENDIX

PAGE

1. Excerpts from trial transcript, Arlington Circuit Court, April 13, 1992.

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 412 L. Ed. 2d 789 (1974) 14

Michigan v. Long, 463 U.S. 1032, 103 S. Ct., 3469, 77 L. Ed. 2d 1201 (1983) 12,13,14,15

Milkovich v. Lorain Journal Co., et al. 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990) 12,14

OTHER FEDERAL CASES

Blue Ridge Bank v. Veribanc, Inc., 866 F. 2d 681 (4th Cir. 1989) 12

Potomac Valve and Fitting, Inc. v. Crawford Fitting Co., 829 F. 2d 1280 (4th Cir. 1987) 12,13,16

PAGE

Lapkoff v. Wilks, 969 F. 2d 78 (4th (4th Cir. 1992) 16

STATE COURT DECISIONS

Chaves v. Johnson, 230 Va. 112, 355 S.E. 2d 97 (1985) 13,14,16

BETTY EDWARDS filed her Petition for a Writ of Certiorari in this court on July 14, 1993. Respondents have filed a Brief in Opposition to the Petition, and the Petitioner hereby responds to certain issues raised by the Respondents in their Brief.

JURISDICTION

This court's jurisdiction to review the Virginia Supreme Court Order of April 16, 1993, is invoked pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

FIRST AMENDMENT TO U.S. CONSTITUTION

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The Petitioner fully set forth the facts of the case in her Petition For Writ of Certiorari. However, because Respondents, in their Brief In Opposition, have made certain factually inaccurate statements and have taken others out of context clarification of the facts is necessary.

Respondents assert, on page 5 of their

Brief, that Petitioner did not replace herself on the schedule for January, 1990 and that she went to Florida rather than undergo psychiatric treatment. The trial testimony not only from Petitioner but from Respondents' witnesses as well was that prior to going to Florida for a brief period of recuperation, Petitioner met with the then head nurse, Kim Donahue, fully explained her situation, was given full permission, and, in fact, encouragement, to take this time to recuperate. Moreover, Petitioner's testimony that during this time she was, in fact, receiving treatment from a psychiatrist, who had full knowledge of her trip was uncontradicted. Respondents assertion that she was not receiving treatment is, therefore, contrary to record evidence.

Additionally, testimony adduced at trial

was that Petitioner was told to contact the Hospital when she was ready to return to work. No indication was ever given to her that her job would be in jeopardy if she took this time off to recuperate. Rather, the indication was exactly the opposite.

While Petitioner was out of town, Evelyn Vardiman became the Head Nurse. When Petitioner returned, she learned that notwithstanding the fact that she had full permission to be away Evelyn Vardiman had dropped her from the register. This was tantamount to a termination, inasmuch as a nurse who is not on the register can not be called in for work. She was told in a brief meeting with Ms. Vardiman that the reason was unavailability. When Petitioner contacted Ms. Vardiman and asked for written reasons, her request was denied. Rather than provide

reasons to her, the notice was placed in the Communications Book for all staff employees to see as well as anyone else who happened to be in the staff lounge.

Respondents asserted, on page 6 of their Brief, that only three registered nurses saw the notice. This assertion is fallacious and contrary to record evidence. Respondents admitted in their answer filed with the trail court that another category of employee, i.e., therapists, had seen the notice. Moreover, there was testimony at trial that the Communications Book functioned as a bulletin board. Other employees' initials appeared in the Communications Book indicating that they had read the notices contained therein. Evelyn Vardiman herself testified at trial that she specifically placed the notice in the Communications Book so that it would be read

by all staff employees on every shift. (Tr. 510). Staff included not only registered nurses but many other categories of employees as well who had no duty or responsibility to call a nurse in for duty. (Petition at 11) In view of their pleadings and trial testimony, it is disingenuous for Respondents to now attempt to argue that the notice was only seen by three nurses and that their opinions of Petitioner were unchanged. Testimony adduced at trial was that a co-worker saw the notice, copied it verbatim, contacted the Petitioner and read it to her. Petitioner's co-workers read the notice to mean that Petitioner had been dropped because she was unreliable and had been counseled or reprimanded about her reliability on three prior occasions. Petitioner's co-workers also testified that they were surprised not only

because they viewed Petitioner as reliable but because of the open nature of this communication.

Further, because the trial court found that the statements in the notice constituted defamation per se, it is unnecessary for Petitioner to quantify her damages and show that opinions of her were, in fact, changed. However, the Petitioner testified that subsequent to the notice her former co-workers, whom she had regarded as friends, stopped calling her and had nothing further to do with her.

Petitioner adduced ample testimony at trial that her personal problems never interfered with her work performance. In her 1989 performance appraisal her reliability was rated as "outstanding." Evelyn Vardiman herself testified at trial, on cross-

examination, that prior to placing the notice in the Communications Book she sped read Petitioner's performance appraisals and concluded that her reliability had been outstanding (Tr. 540). She testified that her conclusion was that Petitioner was a good nurse, was doing a good job and that the staff felt that Petitioner was reliable (Tr. 539). She also conceded that reliability encompasses professional competence (App. at 4).

The evidence was uncontroverted that Petitioner never failed to contact the Hospital when she needed to be absent, that she sent in appropriate replacements when possible, although not required, that she had permission and, in fact, encouragement to be away beginning in January, 1990, and that no one ever told her that her job was in jeopardy for taking a recuperative period. Petitioner,

in terms of actual hours worked, ranked third out of twenty-six PRN nurses on the register in 1988, and in 1989 she ranked fourth out of twenty-six PRN nurses on the register.

ARGUMENT

I. THE STATEMENTS MADE CONCERNING PETITIONER CONTAINED PROVABLY FALSE FACTUAL CONNOTATIONS AND, THEREFORE, CONSTITUTE ACTIONABLE DEFAMATION, NOT PROTECTED OPINION.

The statements concerning Petitioner clearly contain provably false factual connotations. Any person reading this notice could reasonably deduce a myriad of adverse facts about the Petitioner, e.g. that she had mixed up patients' medications, failed to give necessary medications, or failed to follow doctors orders. Evelyn Vardiman admitted on cross examination that clinical competence was part of reliability. (App. at 4).

Because Ms. Vardiman did not designate in

the notice which parts of reliability were considered in removing Petitioner from the register, it is imperative to consider all aspects of reliability in determining that the statements contain provably false factual connotations. No limitation as to time frame or components of reliability was contained in the notice. Therefore, Petitioner's entire period of employment must be considered in making this determination as well as all aspects of reliability. Respondents have conceded in their memorandum filed with the trial court and in their arguments made to the court that the components of reliability are verifiable. It was uncontroverted at trial that Petitioner was a competent psychiatric nurse.

It should again be emphasized that the jury found that, based upon the evidence

adduced at trial, the statements made concerning the Petitioner were false. Respondent continues to argue that the statements were true. However, the issue is whether they can be characterized as true or false or whether they contain provably false factual connotations, not whether they are, in fact, false. The trial court did not set the verdict aside on the basis that the evidence adduced to prove the falsity of the statements was insufficient but rather on the sole basis that the statements were opinion.

In the Order, the trial court explicated that the statements were opinion <u>because</u> they were loosely definable and variously interpretable, could not be characterized as true or false, did not contain defamatory assertions of objective fact, and could not be proved true or false. In their Brief In

Opposition, at page 10, Respondents argue that the trial court did not simply label the statements as opinion but made additional findings based on the above criteria. The above criteria are all set forth in federal cases, Blue Ridge Bank v. Veribanc., Inc., 866 F. 2d 681 (4th Cir 1989), Potomac Valve and Fitting, Inc. v. Crawford Fitting Co., 829 F. 2d 1280 (4th Cir. 1987), Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). While these cases set forth criteria to be used to determine opinion versus fact, they are all predicated upon the federal right to free speech contained in the First Amendment to the United States Constitution.

II. THE STATE COURT DID NOT BASE ITS DECISION ON ADEQUATE, INDEPENDENT STATE GROUNDS.

As in the case of Michigan v. Long, 463 U.S. 1032 (1983), the trial court's decision

in the case herein involved the application and interpretation of federal case law. In this case, as in Michigan, there was a passing reference to the State Constitution in one of the cases cited by the trial court, Chaves v. Johnson, 230 Va. 112, 355 S.E. 2d 97 (1985). However, it is clear from reading the opinion Chaves that the decision was based upon federal law (Petition at 33-34). Respondents argue that the court's citation in Chaves to Thomas Jefferson's Inaugural Address supports their argument that there was an adequate, independent state ground for the decision. Petitioner contends that the citation in Chaves to Thomas Jefferson's Inaugural Address supports her contention that the Chaves decision was, in reality, based upon federal doctrine despite the passing reference to the Virginia Constitution. The court in Potomac

Valve also cited Thomas Jefferson's Inaugural Address and that case was unequivocally based upon the federal right to free speech. Moreover, the court in Chaves clearly relied upon the exact passage from Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), later determined by the court in Milkovich to be inappropriately relied upon in determining opinion versus fact.

Respondents argue that a commentator analyzing defamation cases in Virginia observed that the Chaves court predicated its decision on both the First Amendment to the United States Constitution and also on the Virginia Constitution. Petitioner contends that this court is certainly not bound by the speculations of a commentator when a fair reading of the Chaves opinion clearly indicates that it was, in fact, based upon

federal law. Moreover, the court in Michigan held that notwithstanding a passing reference to the State Constitution, the United States Supreme Court had jurisdiction to review the decision in the absence of a "plain statement that the decision below rested on an adequate and independent state ground." Michigan at 1031. The court in Michigan stated in pertinent part:

> The references to the State Constitution in no way indicate that the decision below rested on grounds in any way independent from the state court's interpretation of federal law.

Michigan at 1031.

Similarly, the trial court in the case herein, in finding that the statements were protected opinion, relied upon the cases cited in Respondents' memorandum of points and

authorities. All cases relied upon by Respondents were federal except Chaves which was decided on federal law.

Respondents also cite Lapkoff v. Wilks, F. 2d 78, 81-82 (4th Cir 1992) to support their position that the decision in this case was based upon an adequate, independent state ground. While the court in Lapkoff was careful to state that it was relying upon state grounds to find that the statements at issue were protected opinion, it is dubious whether that was, in fact, the case. The court clearly applied the tests enunciated in federal case law, citing Ollman v. Evans, 750 F. 2d 970 (D.C. Cir (984) (en banc), and Potomac Valve & Fitting Co. v. Crawford Fitting, 829 F. 2d 1280 (4th Cir. 1987). The court in Potomac Valve specifically stated that the decision was based on the federal

right to free speech. In any event, the mere citation to Chaves in Lapkoff does not mean that the court in Chaves based it's decision on state rather than federal grounds.

Respondents, in their Brief at page 20, make the argument that had the Virginia Supreme Court accepted this case for review, it would have determined that there was no evidence to support the jury instruction as to abuse of qualified privilege, and that, therefore, there would have been an independent state basis for the decision. Petitioner contends that this is totally inappropriate speculation. However, such assertion is fallacious and contrary to record evidence. An abundance of evidence was adduced at trial to demonstrate abuse of privilege. Petitioner also contended in the Petition For Appeal that it was error for the

trial court to have found a qualified privilege. This was not a communication made to an employee by an employer, but rather a communication made about an employee to everyone except the employee. It could just as well be speculated that the Virginia Supreme Court would have found that no qualified privilege existed.

Evidence adduced at trial and arguments to the trial court regarding the abuse of privilege included the fact that the words used were stronger than the situation required, that there was undue publication of the statements, that Evelyn Vardiman did not believe the statements were true when she published them and published such statements with reckless disregard for the truth.

The testimony of Petitioner's witness was that Evelyn Vardiman confided to her that the

"real reason" for removing Petitioner was the fact that she made a suicide attempt. If that was characterized by Ms. Vardiman as the "real reason" then obviously she did not consider the reason placed in the notice as the real one. Additionally, Ms. Vardiman testified that prior to placing the notice in the Communications Book she had concluded that Petitioner's reliability had generally been outstanding, and that the staff felt she was reliable. (Tr. 539). Prior to publishing the notice, she did not talk with Petitioner concerning her situation or look at the number of hours she had worked compared to that of other PRN nurses.

The jury was asked to decide whether the statements made concerning the Petitioner were false and whether they were made with common law or actual malice. The response to both

questions was in the affirmative. The trial court did not set aside the verdict on the basis that the evidence of abuse of qualified privilege was insufficient, but on the sole basis that the statements were protected opinion.

CONCLUSION

For the reasons stated herein, the Respondents have failed to assert any valid basis for the denial of the Petition in this case.

Respectfully submitted,

Clara A. Williamson, Esq.
211 N. Union Street
Suite 100
Alexandria, VA 22314
(703) 548-0738
Attorney for Petitioner

APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE COUNTY OF ARLINGTON

BETTY EDWARDS,	:	
Plaintiff,	:	
vs.	:	AT LAW NO. 90-1254
ARLINGTON HOSPITAL ASSOCIATES, ET. AL.,	:	
Defendants.	:	

VOLUME 3

Arlington, Virginia

Monday, April 13, 1992

The trial commenced at 10:15 o'clock, a.m.

BEFORE:

The Honorable Benjamin Kendrick, Judge.

Reported By: Deborah A. Docteur

ACCURATE STENOTYPISTS, INC.
P.O. BOX 485, FAIRFAX, VIRGINIA 22030
PHONES: (703) 273-9367, 691-0480
/ FAX (703) 591-0340

. . . . . .

Q. Ms. Vardiman, would you agree that the word reliability encompasses much more than physically being on the job?

A. Yes.

Q. If a nurse, for example, gave the wrong medication to a patient, would you consider the nurse reliable or unreliable?

A. Well, I think it -- that kind of relates to clinical competence. And I would imagine it would depend on how many times she did that.

Q. You don't view clinical competence as being any part of the reliability?

A. It's a different issue, but yes, I would say --

Q. -- that clinical competence is part of the reliability?

A. Could be, yes.

Q. If a nurse did give the wrong medication, or failed to give medication, then that nurse would not be reliable?

A. That's not the whole of it. I would more consider that a matter of the clinical competence, in that --

Q. (Interposing) -- But it would bear on the nurses reliability?

MR. SMITH: I object. I would ask that the witness be allowed to answer. This is not an argument.

MS. WILLIAMSON: I'm sorry. Go ahead.

THE WITNESS: Whether you give the right medication to a patient, or whatever, is a matter of competence and it's not

necessarily a part of reliability. I think if you were consistently doing that, that might be reliability in some way.

THE COURT: You can be reliable and incompetent, is that what you are saying?

THE WITNESS: No, it's not. Is that what it sounds like?

THE COURT: Yes.

THE WITNESS: I'm sorry. I believe it would relate to reliability.

BY MS. WILLIAMSON:

Q. And if a nurse forgot to give medication at all, failed to give it at all, would that relate to the nurse's reliability?

A. Yes.

Q. If a nurse failed to follow the doctor's instructions, would that relate to her reliability?

A. Yes.

Q. If she made a wrong entry in a patient's chart, would that relate to her reliability?

A. It would, but there would be more issues than just that. You're naming procedures that are common.

Q. Is it fair to say, Ms. Vardiman, that the word reliability involves a whole question of professional competence, doesn't it?

A. And in my mind, professional competence has to do with using good judgment, being healthy and well prepared to come to work, having skill and knowledge of the clinical area that you're working in, being available.

To me, the bottom line of being professionally reliable and competent is being where you're supposed to be, being counted on to be there to give the care to the patients

as you agreed to do.

Q. But reliability does involve professional competence, doesn't it?

MR. SMITH: Objection. Asked and answered.

THE COURT: Sustained.